In the

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. ~~1133~~, ~~1134~~, and ~~1135~~
60 61 & 62

FEDERAL POWER COMMISSION
THE UNITED GAS IMPROVEMENT COMPANY
BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

SUNRAY DX OIL COMPANY, SOHIO PETROLEUM COMPANY, TEXACO, INC., GULF OIL CORPORATION, SUN OIL COMPANY, EDWIN L. COX, LAMAR HUNT, HUMBLE OIL & REFINING COMPANY AND UNION PRODUCING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT, LAMAR HUNT

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 1133, 1134, and 1135

FEDERAL POWER COMMISSION
THE UNITED GAS IMPROVEMENT COMPANY
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BREIF IN OPPOSITION FOR RESPONDENT, LAMAR HUNT

LAMAR HUNT, one of the Respondents in the captioned cases, files this, his Brief in Opposition and prays that the captioned Petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 9, 1966, be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit and the dissenting opinion are reported in 370 F. 2d 181.

The opinion and order of the Federal Power Commission are reported at 31 FPC 623, and on rehearing, at 31 FPC 1315. The Commission's opinions are also included in the joint appendix of the record (herein referred to as J.A.) submitted to the Court of Appeals for the Tenth Circuit at pages 354-396 and 409-418.

JURISDICTION

The jurisdictional requisites are adequately set forth in each of the petitions filed herein.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. § 717-717w, are set forth in the petition filed in Case No. 1133 (FPC Pet. pp. 2-3). The Statement of General Policy No. 61-1, 18 C.F.R. 256(a), 24 FPC 818, is set forth in Appendix A of the Brief in Opposition, filed by Respondent, Sun Oil Company.

QUESTIONS PRESENTED

1. Pursuant to Section 7(e) of the Natural Gas Act, the Federal Power Commission (Commission) may issue temporary certificates of public convenience and necessity authorizing the immediate commencement and delivery of sales of natural gas pending hearing and determination on applications for permanent certificates. In so doing, the Commission is required in accordance with this Court's decision in *FPC v. Hunt*, 376 U.S. 515 (1964) to attach thereto such conditions, e.g. price reduction, refund, moratoria, as may be necessary to protect the consumers during the interim in which the temporary certificate is operative.

One issue presented by each of the subject petitions is: May the Commission, after having issued *unconditioned no-refund* temporary certificates, subsequently attach conditions to the permanent certificates requiring retroactive refunds of amounts collected during the pendency of the temporary certificate where the producer had no notice of any such refund obligation?

2. An additional question appears in the petition filed by the distributor interests in Nos. 1134 and 1135. Restated it is: In determining the "in-line" price, did the Commission abuse its administrative discretion by refusing to restrict its determination to permanently certificated sales representing only 1.39% of the gas sold?

STATEMENT

On March 23, 1964, the Federal Power Commission issued to the producers (Respondents) permanent certificates of public convenience and necessity authorizing sales at a 16¢ "in-line" price of natural gas produced from fields geographically located in Texas Railroad Commission District No. 4.[1] (J. A. 354-396). These sales had been earlier commenced at prices ranging from 16¢ to 18¢ per MCF pursuant to temporary certificates theretofore issued pending hearing and determination on permanent certification.

In granting these certificates, the Commission further asserted the power to order at some subsequent date refunds

[1] The Commission by *Statement of General Policy No. 61-1*, (Policy Statement), 24 FPC 818, divided for pricing purposes the Continental United States into twenty-three producing areas. The boundaries of one of those areas coincide with the boundaries designated by the Texas Railroad Commission as District No. 4.

of all or a portion of any amounts collected under the temporary certificates above the 16¢ price level.[2]

A review of the historical evolvement of the subject certificate applications in the light of the prevailing administrative policy is necessary to appreciate the significance of the Commission's action. Each of these temporary certificates was issued after September 28, 1960, the date of issuance of the Commission's *Statement of General Policy AR 61-1*, 18 C.F.R. 2.56, 24 FPC 818 (Policy Statement). Issued in conjunction with its precedent setting Phillips-on-remand decision[3], this Policy Statement purported to establish price standards which would serve as "a guidance for the Commission and interested parties as to whether proposed initial rates should be certificated without price condition and whether proposed rate changes should be accepted or suspended." 24 FPC 818. The initial price standard fixed therein for District 4, the area here in question, was 18¢ per MCF.

It was only two months after the issuance of this Policy Statement that Respondent, Lamar Hunt, sought certificate authority, including a temporary certificate, to initiate

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[2] The Commission has now exercised that reserved power by Opinion and Order issued July 27, 1966, *In Re Amerada Petroleum Corporation, et al*, Dkt. No. CI62-1544, *et al*, (Opinion No. 501). It has required refunds of a portion of amounts collected under the temporary certificate. By *per curiam* order in *Standard Oil Company of Texas v. Federal Power Commission*, ... F. 2d ....., No. 9289, March 27, 1967, the Tenth Circuit, based upon the decision here under review, has set aside the Commission's exercise of its asserted power.

[3] *In Re Phillips Petroleum Company*, 24 FPC 537, affirmed 303 F. 2d 380 (D.C. Cir. 1963), and 373 U.S. 294 (1964).

an interstate sale at a price of 16.5¢ per MCF. Uniquely, Hunt's sales contract with its pipeline purchaser provided that in the event Hunt did not receive promptly an unconditioned temporary certificate authorizing the sale as contracted, the gas would be sold exclusively in the intrastate market. Thus, there was reserved to Hunt the choice of an interstate or an intrastate market dependent upon the conditions, if any, that were attached to the temporary certificate authorizing the interstate sale.

On April 10, 1961, some five months after temporary authority was requested, the Commission tendered Hunt an *unconditioned no-refund* temporary certificate. Relying upon the unconditioned nature of the proffered temporary certificate and in view of the certificated price being well below the price standard of the Policy Statement, Hunt accepted the certificate and committed his gas to the interstate market.

Subsequently Hunt's sale, together with those of other Respondents, was consolidated for a hearing on the permanent certification. However, prior to the commencement of these consolidated hearings, in October of 1962, the distributor petitioners asked the Commission to impose refund conditions upon those temporary certificates which contained no refund condition (J.A. 225). The Commission emphatically denied this request stating that such would be contrary to the public interest and inconsistent with its obligation to act with such certainty as to allow the exercise of a choice by producers of whether to commit their gas to the

interstate market (J.A. 275-282). This order was not appealed.

After completion of hearings limited solely to the derivation of a so-called "in-line" price, the Commission issued the opinions here under review. Upon judicial review, sought by both the producers and distributor interests, the court below affirmed the Commission's price line determination and its permanent certification in accordance therewith. The Court, however, reversed the Commission's assertion of power to order retroactive refunds of amounts collected under and pursuant to unconditioned no-refund temporary certificates, holding that absent a specific refund condition, the Commission could not retroactively modify a validly issued temporary certificate.

Review of the Tenth Circuit's decision, insofar as it relates to the Commission's power to order retroactive refunds, is now sought by the Commission and distribution companies. In addition, the distributors contend that the court below erred in affirming the Commission's 16¢ "in-line" determination.

REASONS FOR DENYING THE WRIT

REFUND ISSUE:

Petitioners' collective argument on this issue is premised upon an erroneous construction of the Tenth Circuit's decison. Lifting the result out of its context, they argue that the Court's holding unduly restricts the Commission's power to protect the consumer during the period in which tempo-

rary certificates are operative. As such, they allege (1) that the court below was clearly wrong and inconsistent, at least in principle, with earlier decisions of this Court; and (2) that the decision presents a question of substantial importance in the administration of the Act and one on which the Circuits are divided. The Respondent submits the Petitioners are wrong not only in their broad construction of the Tenth Circuit's decision, but also in their allegations of error and importance. As such, the petitions should be denied for the following reasons:

(1) *The decision below is clearly correct.*

While Petitioners would characterize the issue as one relating to the Commission's conditioning powers in the issuance of permanent certificates, the essence of their argument is in reality an effort to strip all significance and validity from the Commission's issuance of temporary certificates. If Petitioners prevail, temporary certificates will become meaningless. The Commission could thus retroactively annul or amend any temporary certificate or modify any of the conditions imposed thereupon. It would even be free to withdraw the very conditions which may have induced the committal of gas to the interstate market. To impose upon an unwary natural gas company such hidden liabilities has been described by the court below in a related case as being "unconscionable", *Pan American v. Federal Power Commission,* F. 2d .....; (Nos. 7192, *et al,* March 9, 1967.)

Certainly Hunt does not deny that the consumers are entitled to protection during the pendency of temporary certificates. The Commission's authority and obligation to so

protect the consuming public during this interim was the very subject of this Court's decision in *Federal Power Commission v. Hunt*, 376 U.S. 515 (1964). There the court made clear not only the broad authority vested in the Commission in the issuance of temporary certificates under Section 7(e), but also the importance and necessity of such authority being properly exercised. Speaking through Mr. Justice Clark, the court stated:

> "When the independent producer knocks on the door of the Commission for permission to enter his gas in interstate commerce he must submit to the requirements of §7. His natural gas must be certificated before it can move into interstate commerce. If he wishes to avoid the delay incident to a hearing for a permanent certificate he may apply for temporary authorization, which may be granted upon *ex parte* application. *In view of this, the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties. This condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate.* In view of the *ex parte* nature of the proceeding, it appears only fair to all concerned that the condition upon which the rate was temporarily certified be continued unchanged until the permanent certificate is issued." (Emphasis added.) (376 U.S. at p. 523)

Thus, contrary to Petitioners' argument, the exercise of administrative discretion in conditioning or not conditioning temporary certificates does have meaning. Otherwise, why *must* the Commission have authority to condition a temporary certificate; why be concerned with avoiding *irreparable* injury? If the Commission can later, on permanent certification, retroactively modify lawful temporary certificates, then the temporary certificates are devoid of signifi-

cance. Petitioners' argument simply cannot be reconciled with *Hunt*.

Petitioners' reliance on *United Gas Improvement Co., et al v. Callery Properties, Inc.*, 382 U.S. 223 (1965) (Callery), is likewise misplaced. Admittedly, this Court there upheld refunds of amounts collected during the pendency of judicial review of permanent certificates which were ultimately set aside. However, the Commission's certificating action there never became final; the producers through judicial review were put on notice of possible modification of their certificates.

Here, in contrast, the producers had no such notice;[4] the Commission's initial certificating orders became final.[5] In

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[4] The Petitioners point to certain routine 'boiler plate' language contained in the temporary certificates having put the producers on notice of possible retroactive modification. It is noteworthy that virtually identical language is contained in the permanent certificates issued herein. Compare the temporary certificate, e.g. J.A. 194, with ordering paragraph K of the permanent certificate (J.A. 387). The latter provides:

> "Such grant is without prejudice to any filing or order which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the applicants."

Certainly this language does not detract from the finality of the permanent certificate. Neither does similar language in the temporary certificate. As the court below found, the Commission is merely not binding itself to issue an identical permanent certificate of prospective effect after a hearing.

[5] While the reviewability of temporary certificates is well established, *Pure Oil v. FPC*, 292 F. 2d 350 (7th Cir., 1961); *Sunray v. FPC*, 270 F. 2d 404 (10th Cir., 1959), no review was sought of these temporary certificates. Their finality cannot be discredited, as Petitioners would attempt to do, on the basis of their being issued *ex parte*. The issuance of *ex parte* temporary certificates is a matter of public record and in practice has *always* been available for examination in the public reference room of the Commission. The Commission's own regulations, 18 C.F.R. 1.36 (c)(6) so require.

further contrast, the producers were given specific assurances by the Commission that their temporary certificates would remain unchanged during their operativeness. In October of 1962 certain distributors asked for the imposition of a specific refund condition. The Commission denied such request stating that modification of existing temporary certificates would not be in the public interest:

> "* * * we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon application with 'such certainty as to allow the exercise of choice upon (the producers') part.' *Sunray Mid-Continent Oil Company v. FPC*, 270 F. 2d 404. Equally important it would so denature the value of a commission authorization as to place any reliance upon our actions in this area in serious jeopardy." (J.A. 277)

Thus, in this instance the Commission not once, but twice, considered the possibility of imposing refund conditions, and both times decided against such action. Interestingly, this order denying the imposition of refund conditions was not appealed. The distributor Petitioners certainly cannot claim that they were precluded by lack of notice from appealing this Commission action.

While *Callery* is clearly distinguishable, it is noteworthy that this Court in *Callery* reaffirmed the principle that the Commission has no power to make reparation orders *(Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 618). Yet, reparations are exactly what Petitioners are

here seeking, i.e., refunds collected under a lawful order which even now remains unchallenged and unimpeached.

Admittedly, in the exercise of its administrative discretion, the Commission may not always precisely predict the price that it will ultimately determine on permanent certificate hearing to be required by the public convenience and necessity. There may be instances in which the temporary certificate price may differ from the permanent certificate price. In some cases as in the Permian Basin Area, the permanent certificate price may be higher. The initial price standard established by the Commission's Policy Statement for that area was 16¢, and temporary certificates issued thereafter were conditioned to this price. However, permanent certificates were subsequently issued authorizing the same sales at 16.5¢ per MCF.[6] Certainly, according to Petitioners' argument, the producers in such circumstances were entitled to a modification of their temporary certificates and a retroactive payment of the difference in price. To so hold is to regard the Commission's issuance of temporary certificates as an exercise in futility which is clearly inconsistent with this Court's holdings in *Hunt* and *Callery*.

(2) *The issue presented is unique and not of sufficient importance to warrant intervention by this Court.*

Petitioners grossly exaggerate the importance of this issue, claiming that a large number of sales with potentially large refunds will turn on the same issue. In view of an alleged conflict with the Court of Appeals for the District of Columbia

[6] *In re Area Rate Proceeding 61-1*, 34 FPC 418 (1965).

in *Public Service Commission of New York v. Federal Power Commission*, 329 F. 2d 242, cert. denied, sub. nom., *Prado Oil & Gas Co. v. Federal Power Commission*, 377 U.S. 963 (Skelly), they urge prompt resolution by this Court.

It is undisputed that the issue relates to a limited number of contracts for a limited period. In fact, the entire "in-line" concept is an interim procedure. Even the Commission recognizes that the ruling below can be avoided in the future by inclusion of express refund conditions in new temporary certificates.[7] Thus, at most, the issue relates solely to a limited number of sales awaiting permanent certification for a past locked-in period.

The reference by the Petitioners to the large number of contracts[8] that will be controlled hereby is somewhat misleading. In the first place the numbers referred to are *extra*-record and are not subject to verification. However, a review of the Commission's work papers used to support its assertion, indicates that of the 567 pending temporary certificates, 91 contain specific refund conditions, and, therefore, would not be affected by the decision below. Of the remaining 476 temporaries which do not contain refund conditions, 403 were temporarily certificated at or below the applicable "in-line' price as previously determined by the Commission, and, therefore, have no potential refund liability. Thus, at best, even ignoring any special circumstances, only 73 contracts could possibly be affected or

[7] FPC Order No. 337, Dkt. R-316 has enunciated just such a policy for issuing future temporary certificates.

[8] This was originally referred to in Petitioners' brief as 579 contracts. The Commission now admits that the figure should have been 476 contracts.

controlled by the outcome of the decision below on this issue.

The reference to potential refunds under pending cases is likewise speculative. Most of these cases are still pending either before the Commission or the courts. In fact, the Commission has yet to be finally judicially upheld in its ordering specific retroactive refunds of amounts collected under unconditioned temporary certificates. Thus, recitation of what may ultimately be affected by the decision overstates the issue.

In view of the locked-in period involved, the limited duration of the "in-line" pricing procedure, and the steps taken by the Commission to preclude the issue from being raised in the future, Respondent submits that the question presented is not of sufficient importance to warrrant intervention and resolution by this Court. As earlier indicated, this issue was decisively dealt with in *Federal Power Commission v. Hunt*, *supra*, and a further consideration of the limited issues here presented would be in large measure a duplication of the previous consideration.

"IN-LINE" PRICE DETERMINATION:

The distributor Petitioners also question the Tenth Circuit's affirmance of the Commission's "in-line" price determination. Principally, they object to the Commission's consideration of temporary certificates, intrastate sales, and its Policy Statement in determining the prevailing price line. The Petitioners charge that the affirmance of this action by

the court below conflicts with the D.C. Circuit's decision in *Public Service Commission of New York v. FPC*, ... F. 2d .... (No. 19,796, February 7, 1967).

The Petitioners ignore the expertise to be accorded to an administrative agency in such matters. Unfortunately, the determination of an "in-line" price has not evolved into an exact science; therefore, in deriving an "in-line" price, certain administrative latitude has been permitted.

If specific standards theretofore used had been there applied, i.e., median prices, weighted average prices, etc., the price line would have been much higher. In fact, Respondents vigorously claimed in the court below that the Commission had erred on the low side in fixing a 16¢ price line.

A review of the facts before the Commission reveals ample support for the Commission's failure to adopt the extreme position now advanced by the distributors. Admittedly, the Commission looked beyond the permanently certificated sales for indeed they had no choice, since so few sales had been permanently certificated in the area. As the Commission noted:

> "Unlike the situation in *Skelly* there is no substantial volume of gas presently under permanent certification. Examination of the staff exhibit reveals that the permanently certificated sales considered by the examiner in fixing the 'in-line' price amount to only 1.39 percent of the volumes for all sales shown and to no more than 2.05 percent of the sales permanently certificated in the District contained in the exhibit. * * * In our opinion it

> would be manifestly improper to base an 'in-line' price upon the initial prices permitted in these few isolated and inherently nonrepresentative sales whose total volume does not even begin to approach the amount of natural gas production involved in these dockets." (J.A. 371)

In following this Court's directives in *CATCO*[9] and *Callery*, it was necessary for the Commission to determine the various prices at which substantial volumes of gas were being sold. In view of the limited number of permanently certificated sales, it was necessary for the Commission to consider temporarily certificated sales in order to base a decision on a substantial volume of gas. As the Commission recognized:

> "Refusal to consider the temporarily authorized prices, in the circumstances of this proceeding, and reliance only on the few permanently certificated prices can only result in a complete stagnation of prices at the 'in-line' level initially determined for this District, a level based on prices being paid for gas under contracts drawn up long before these contracts were executed."

A much different situation existed in the *Hawkins-Sinclair* cases in which the D. C. Circuit in *Public Service Commission of New York, et al v. Federal Power Commission*, (Nos. 19797, February 7, 1967), reached a different result. There a substantial number of sales and volumes of gas were permanently certificated. While the distributor Petitioners may not recognize the distinction between the two cases, the D. C. Circuit did. Speaking for the court, Judge Bazelon, quoted so extensively by Petitioners to establish an

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[9] *Atlantic Refining Company v. Public Service Commission of the State of New York*, 360 U.S. 378, (1959).

"irreconcilable" conflict, observed that the Tenth Circuit faced a different problem:

> "There, (referring to this case), only 1.39% of the gas sold in the area was permanently certificated. * * * In our case there is a substantial volume moving under permanent certificates. We are not reviewing the FPC's method of determining an in-line price when there are no permanently certificated prices available for comparison." (Slip op. p. 22)

Furthermore, in view of the Commission's very candid admission that it selected the lowest segment of the range of "in-line" prices, whatever advantage the producers may have derived from the use of temporarily authorized sales was clearly offset. The concept of "the lowest segment of the range of 'in-line' price" is certainly inconsistent with this Court's *Callery* decision which described the "in-line" price as a device which will prevent gas from entering interstate commerce at prices higher than the existing levels. 382 U.S. at p. 227.

Here the Commission should have found Hunt's 16.5¢ price to be in-line; the weighted average price was above 17.178¢ per MCF (J.A. 374); over 82% of the gas is sold at 16¢ and above (J.A. 375); 71% of the gas was being sold at 17¢ and higher (J.A. 373). Thus, it is manifest that the Commission did not abuse its discretion in determining the price line by refusing to restrict itself to a de minimus number of permanently certificated sales.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that these Petitions for Writs of Certiorari should be denied.

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